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In the
Supreme Court of the United States
..... TERM, 1974

No. 73-1805

MARION MURTAGH AND WILLIAM JOSEPH POWELL,
Petitioners

v.

UNIVERSITY COMPUTING COMPANY,
A TEXAS CORPORATION, *et al*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents University Computing Company, *et al*, respectfully submit this Brief in opposition to Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for The Fifth Circuit, and pray that said Petition be denied.

STATEMENT OF THE CASE

The following statement corrects certain inaccuracies contained in, and supplies facts omitted from, Petitioners' Statement of the Case. Hereinafter, references in this Brief to "Respondent" should be understood to refer to University Computing Company.

Petitioners' suit, though pigeon-holed by Petitioners' pleadings under various theories of recovery including breach of contract, conversion and fraud, turns upon a single central issue: The nature of the stock acquired by Petitioners from Respondent as consideration for the sale of Petitioners' companies to Respondent. Petitioners claim that they were to have received freely marketable stock under the acquisition agreement, and they base that claim upon alleged representations of Respondent's employees to that effect in the negotiations leading up to the execution of that agreement. Petitioners claim that the stock they received was *not* freely marketable by reason of restrictions arising out of the Securities Act of 1933, and that such fact shows both a breach of contract and a misrepresentation constituting actionable fraud. Finally, Petitioners contend that Respondent's acts in treating the stock as not freely marketable by reason of restrictions arising out of the Securities Act of 1933, constituted a conversion of the stock.

Respondent has denied Petitioners' allegations and has contended that those allegations are not actionable at law, that Petitioners' measure of damages is wholly improper

and that all of Petitioners' claims have been extinguished by virtue of a compromise and settlement agreement between the parties.

In response to special interrogatories submitted pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, the jury found that in March of 1970 a bona fide dispute existed between Petitioners and Respondent with respect to the stock delivered to Petitioners under the acquisition agreement, and that in that month the parties entered into an agreement "in full and complete satisfaction of all claims and controversies between the parties" whereby Respondent agreed to register Petitioners' stock with the Securities and Exchange Commission and to accelerate the remaining installment payments of stock and cash due under the acquisition agreement (R. 1568).

Thereafter, Respondent proceeded to take appropriate action to register Petitioners' shares and to accelerate delivery of the remaining installments of cash and shares payable under the acquisition agreement. However, before Respondent could fully perform its promise in the compromise and settlement agreement, Petitioners advised Respondent that the compromise and settlement agreement was no longer acceptable to Petitioners and that Respondent would hear from their attorneys in the near future (R. Vol. 4, p 80). The only explanation given by Petitioners for their repudiation of the compromise and settlement agreement was that Petitioners had become disturbed about the way the company was being managed and did not want to go through with the compromise and settlement agreement

(R. 1267). Notwithstanding Petitioners' repudiation of the compromise and settlement agreement, Respondent continued its efforts with respect to registration of all of Petitioners' stock, and such registration was accomplished on May 6, 1970, and was declared effective on May 27, 1970 (R. 1356-57). Petitioners took advantage of such registration by selling their stock after May 27, 1970 (R. 1374-77, 1368). Accelerated delivery of the remaining installments of stock and cash was not attempted in view of Petitioners' indication that such terms would not be honored, but the jury found that Respondent was ready, willing and able to do so, and would have done so had Petitioners not repudiated the compromise and settlement agreement (R. 1569). Before judgment was entered in this case, Respondent had delivered all of such remaining stock and cash to Petitioners in accordance with the acquisition agreement.

Petitioners have intimated in their Statement of the Case that they repudiated the compromise and settlement agreement because Respondent had asked them to sign a release in connection with the settlement. There is absolutely no evidentiary support in the record for this statement, as the United States Court of Appeals for the Fifth Circuit specially noted at length in its Opinion (Appendix A to Petition for Writ of Certiorari, p 44).

After the close of testimony in this jury trial, the attorneys and Judge of the Trial Court worked in chambers for approximately two days on the preparation of a charge in the form of special interrogatories with explanatory instruc-

tions. During this work session many objections and suggestions were made by both parties to the form and substance of proposed special interrogatories, but none of those remarks were recorded and none appear in this record. After hearing all of those objections and suggestions, the Charge was finally reduced to writing and the attorneys were advised to make such formal objections and exceptions to the final Charge as they might desire by dictating them to the court reporter in the absence of the court (R.1628). *The attorneys for Petitioners made no objection to proceeding in this fashion.* The attorneys for both parties dictated their objections to the Charge to the court reporter as instructed, and the case was then submitted to the jury. On July 6, 1971, the jury returned its verdict (R.1556).

Nearly six months after the jury verdict, Petitioners filed pleadings designated as "Plaintiffs' Objections and Exceptions to the Charge of the Court" (R.1598). Because these pleadings contained many matters which had not been included in Petitioners' previous objections to the Charge dictated to the court reporter prior to submission of the case to the jury (R.1660), Respondent filed its Motion to Strike the pleadings (R.1651). The Trial Court sustained Respondent's Motion to Strike and ordered that only the objections to the Charge previously dictated by Petitioners to the court reporter would be considered as having been timely filed (R.1667).

Thereafter, on July 5, 1972, the Trial Court entered judgment that Petitioners take nothing against Respondent. Motion for New Trial was overruled and Notice of

Appeal was timely filed. Responding to Petitioners' Motion for Finding of Facts (R.1670), the Trial Court declined to find that all or substantially all of the objections to the Charge filed by Petitioners six months after jury submission had been made in the unreported work session wherein the Charge was prepared (R.1628). Respondent also does not agree that the stricken objections had all been made in the informal work session, as represented by Petitioners (Petition for Writ of Certiorari, p 9).

REASONS WHY THE WRIT SHOULD BE DENIED

1. Procedural Due Process

Petitioners complain that pursuant to Rule 49(a) of the Federal Rules of Civil Procedure, the Court of Appeals deemed certain fact findings against Petitioners in accord with the judgment for Respondent. Petitioners argue that the Court of Appeals should not have applied Rule 49(a) in this case since many of their objections to the Charge had been stricken by the Trial Court as untimely made. While Respondent does not agree with Petitioners that the Trial Court deprived Petitioners of procedural due process in these proceedings, particularly in view of Petitioners' failure to object to the Trial Court's actions at the time, Respondent submits that the Trial Court's actions have no effect on the decision of the Court of Appeals affirming the judgment, since none of the facts deemed to have been found in accord with the judgment were requested by Petitioners to be presented to the jury in either their timely or untimely objections to the Charge.

The deemed findings in question are (1) that the request by Respondent that Petitioners execute a release in connection with the compromise and settlement agreement was not a repudiation of that agreement, (2) that Respondent had not elected to rescind the compromise and settlement agreement after Petitioners' repudiation thereof, and (3) that Petitoners were aware of their rights under securities laws prior to compromising and settling their claims arising thereunder. A review of the stricken "Plaintiffs' Objections and Exceptions to the Charge of the Court" (R.1598) will reveal no request for submission to the jury of these fact issues. Likewise, no such request was made by Petitioners in their objections dictated to the court reporter at the close of the evidence (R. 1653). Rather, the only references made to any of these issues in either of Petitioners' two submissions of objections to the Charge related to Petitioners' objection to submission of the entire theory of compromise and settlement to the jury on the grounds that Respondent, as a matter of law, had repudiated the agreement by requesting execution of a release (R. 1605, Objection XIV; R. 1606, Objection XVI; R. 1612, Objection XXIX; R. 1613, Objection XXXI; R. 1620, Objection XLV). Certainly this was not a request for submission to the jury of the issue of repudiation; rather it was a statement that the issue was established as a matter of law. At no point in either submission of objections to the Charge did Petitioners make reference to either of the remaining fact issues deemed found in favor of Respondent.

In summary, Petitioners' complaints as to procedural due process, if any they have, relate to issues and matters

which have no bearing on the decision in this case; therefore, no question in this respect has been presented which merits this Court's attention.

2. *Alleged Election to Rescind Compromise and Settlement Agreement by Respondent*

Petitioners argue that Respondent intended to and did rescind the compromise and settlement agreement upon Petitioners' repudiation thereof, and that, therefore, Respondent cannot claim the defensive benefit of that agreement. This argument first appeared in this case after the case had been submitted to the jury. Undoubtedly, the issue of Respondent's intention with respect to rescission is one of fact. Petitioners failed to request submission of this fact issue to the jury and failed to object at any time to the absence of such fact issue in the Charge. Accordingly, the Court of Appeals correctly deemed a finding against Petitioners on this issue in accord with the judgment against Petitioners.

The evidence in favor of this deemed finding is overwhelming. Petitioners state at page 12 of their Petition for Writ of Certiorari that "under the undisputed facts in our case Respondent elected to rescind the agreement and cease performance under it . . . ." Petitioners simply ignore the facts in this record that, to the contrary, Respondent has considered the compromise and settlement agreement in force despite Petitioners' attempted repudiation, and, in fact, continued performance of that agreement to the extent that Petitioners' cooperation was not required.

Under the terms of the compromise and settlement agreement Respondent was to register all of Petitioners shares with the Securities and Exchange Commission and was to accelerate delivery to Petitioners of certain shares and cash not then due under the acquisition agreement. The commitment of Respondent in this regard was no small matter, for there was evidence that a registration of shares with the Securities and Exchange Commission could involve between $10,000 and $50,000 of accounting fees, legal fees, printing and reproduction fees, time of officers and directors, etc. (R. 1356-1357). Prior to Petitioners' repudiation of the compromise and settlement agreement, Respondent had initiated the appropriate action to register shares as required by that agreement. Subsequent to Petitioners' repudiation of the compromise and settlement agreement, Respondent continued its efforts to register Petitioners' stock, and on or about May 6, 1970, a registration statement covering the stock of Petitioners was filed with the Securities and Exchange Commission (R. 1356-1357). In this connection on May 7, 1970, Respondent's attorneys advised Petitioners by letter that:

> *"in accordance with the agreement between [Respondent] and each of you dated March 9, 1970* [Respondent] filed with the Securities and Exchange Commission yesterday, May 6, 1970, its Registration Statement No. 2-37320, which registers 39,138 shares owned by Miss Murtagh and 25,675 shares owned by Mr. Powell . . . We expect that the Securities and Exchange Commission should finish processing the Registration Statement within thirty days. As soon as

> it has been processed and declared effective, we will promptly notify you, and after that time you may sell any of your registered shares . . . (R.Vol. 4, p404) (Emphasis added)

Subsequently, on May 27, 1970, the Securities and Exchange Commission declared the Registration Statement effective and the stock was thereafter freely marketable (R. 1374-75). Petitioners took advantage of such registration by selling their stock after May 27, 1970 (R. 1374, 1375). Accelerated delivery of the remaining installments of stock and cash was not attempted in view of Petitioners' indication that such terms would not be honored, but before judgment was rendered in this case, Respondent had delivered all of such remaining stock and cash to Petitioners in accordance with the time schedule set forth in the acquisition agreement.

Thus, it appears that Petitioners' statement that Respondent discontinued its performance under the compromise and settlement agreement is plainly contrary to the direct evidence. Not only did Respondent continue the expensive process of registering Petitioners' shares, but in advising Petitioners of that registration, reference was made to the compromise and settlement agreement as if it were still in force and effect. Petitioners thereafter took full advantage of the compromise and settlement agreement that they had attempted to repudiate on April 18, 1970. This evidence shows the clear intention of Respondent to consider the compromise and settlement agreement in full force and effect notwithstanding Petitioners' repudiation.

Petitioners argue that it should be held as a matter of law that Respondent elected to rescind the compromise and settlement agreement by failing to accelerate delivery of the remaining installment of stock and cash to become due under the acquisition agreement. Petitioners further argue that the Trial Court erroneously instructed the jury that Respondent was not required to continue performance under the compromise and settlement agreement after Petitioners' repudiation thereof. Petitioners simply ignore the applicable rule of law. The law is settled that upon repudiation of a contract by one party, the other party may discontinue its performance until withdrawal of the original repudiation. The rule is illustrated in a case having facts almost identical to those presented here. In *American Textile Machine Corp. v. United States*, 220 F.2d 584 (6th Cir. 1955), the plaintiff sought to avoid a settlement agreement on the same grounds now advanced by Petitioners herein, i.e., that after plaintiff's repudiation of the settlement agreement, the defendant discontinued further performance. In that case, as in this case, the plaintiff telegraphed the defendant that the agreement was no longer acceptable. Defendant thereafter failed to make certain payments of cash required under the original settlement agreement. In holding the settlement agreement to have been a complete bar to recovery by the plaintiff, the Circuit Court said:

> *Further performance, or tender of further performance, was not required after that date, since at that time Appellee had given unequivocable notice that it had rescinded the contract.*

> No tender is necessary when a contract has been definitely repudiated by the other party (citations).
>
> We are of the opinion that the District Judge was in error in not giving effect to the compromise settlement agreement, even though it had not been performed. *Unless shown that it was not a valid contract or that it has been breached by the appellant as distinguished from non-performance, it stands as a bar to the prosecution of the present action.* (Page 589)(Emphasis added).

The same result is required under Texas law upon the same reasoning. *Pacific Employers Insurance Company v. Brannon*, 242 S.W.2d 185 (Tex. 1951) (also involving an unperformed, but unbreached, settlement agreement).

In *Blackman v. Crandell*, 258 S.W. 1073 (Tex. Civ. App. 1924) *dism'd.*, seller and buyer entered into a contract for the sale and purchase of ten cars of potatoes. Subsequently, the buyer wholly repudiated the contract. Seller then waited until buyer's time for performance and sued for the profit on the whole contract as if it had not been rescinded after buyer's repudiation. The buyer attempted to defend on the grounds that seller had not delivered the cars of potatoes, and by that inaction had elected to rescind the contract. The appeals court rejected this defense in these words:

> Since Appellees chose to wait until the stated time for performance, *they were excused from the necessity of performing on their own part unless appellant who had repudiated the contract, withdrew his repudiation.* (page 1076)(Emphasis added)

And in *Myers v. Jefferson Standard Life Insurance Company*, 271 S.W. 217 (Tex. Civ. App. 1925) *aff'd.* 284 S.W. 216 (Tex. 1926), an insurance company wrongfully claimed a forfeiture of a policy. The insured thereafter failed to tender premiums. When the insured died, the insurance company refused to pay on the policy, claiming that the failure of the insured to make further premium payments was an election to rescind the insurance contract. The court held that the insurance contract had not been rescinded:

> . . . The insured was excused from rendering further payments of premiums after notification of the forfeiture of the policy.
>
> 'Payment or tender of premium is not necessary where the insurers have already declared the policy forfeited or upon any act which is tantamount to declaration on their part that they will not receive it if tendered.' (Page 220)

To the same effect is *Young v. Watson*, 140 S.W. 840 (Tex. Civ. App. 1911) *err. ref.*

> One party to a contract is not required to tender performance when the other party thereto has declared that he will not accept such performance or will not do that which he had agreed to do in compensation or return for such performance. (Page 842)

Under these authorities Respondent was fully justified in withholding performance under the compromise and settlement agreement until Petitioners withdrew their repudiation of that agreement, and the Trial Court's instruction to that effect was not error.

3. *Alleged Repudiation by Respondent of Compromise and Settlement Agreement*

Petitioners argue that Respondent attempted to add a more burdensome term to the compromise and settlement agreement when it requested Petitioners to execute a release, and that such attempt constituted a repudiation of the agreement which was accepted by Petitioners. This argument also appeared for the first time in this case after submission of the case to the jury. The questions of whether Respondent's request added a new term to the agreement and whether Petitioners intended to rescind the agreement by virtue of that request are pure fact issues. At no time did Petitioners either request submission of these issues to the jury or object to the failure to include such issues in the Charge. Accordingly, the Court of Appeals correctly deemed findings on these issues against Petitioners and in accord with the judgment for Respondent (Rule 49(a)).

Aside from these procedural barriers to assertion of this point, Petitioners' argument in this respect goes against the evidence and the law. While Petitioners state that the general releases submitted by Respondent to Petitioners for signature contained terms more onerous than those of the oral agreement of compromise and settlement, Petitioners do not state for this Court just what terms were contained in those releases which were so onerous. As a matter of fact, examination of the release (R.Vol.4, p 76) reveals that not a single term of the compromise and settlement agreement

is included in that release. Rather, it sets forth the general language found in most releases regarding discharge of all claims, but makes no attempt to specify terms. Petitioners simply misstate the facts in this regard.

But Petitioners argue further that submission of the releases itself made the compromise and settlement agreement more onerous than originally agreed upon. The jury found Respondent and Petitioners had entered into an agreement "in full and complete satisfaction of all claims and controversies between the parties." This finding constituted a determination by the jury that Petitioners, in fact, had agreed to release Respondent from all liability, whether Petitioners executed formal releases or not. The contractual burden upon Petitioners was not increased by the tender for signature of releases which added no new terms to the agreement already entered into.

The law is settled that a tender of a release following the formation of an oral agreement to compromise and settle all controversies between the parties does not affect such oral agreement and does not constitute an additional condition to such agreement. *Good v. Pennsylvania Railroad Company*, 384 F.2d 989 (3d Cir. 1967); *Main Line Theaters, Inc. v. Paramount Film Distributing Corp.*, 298 F.2d 801 (3d Cir. 1962), *cert. den.* 370 U.S. 939 (1962). *Cf., Aetna Insurance Company v. Sanchez*, 391 S.W. 2d 184 (Tex. Civ. App. 1965).

Moreover, the evidence is wholly against Petitioners' position. Respondent's witness, Eldon Vaughan, testified

that one term of the settlement agreement was that Petitioners would deliver releases of liability (R 1249, 1251). Moreover, Petitioner Powell testified that Mr. Vaughan had said at the settlement meeting: "I want a letter saying there would be no litigation" (R.763). Petitioner Murtagh testified that Petitioner Powell told her shortly after the settlement meeting that Respondent wanted a letter from the Petitioner stating that they would not enter into litigation (R.505,506). In fact, Petitioner Murtagh wrote such a letter shortly after the settlement meeting which stated: "I confirm that I will not proceed with any litigation against UCC if the above arrangement is implemented." (R.Vol.4, p 79). Apparently, Petitioners hope to convince the Court that although Petitioners knew that they were required by the settlement agreement to execute and deliver letters reciting that they would not sue Respondent, they did not agree to execution of releases. The absurdity of such a position is clear.

Not only have Petitioners failed to show how submission of the releases for execution amounted to a repudiation by Respondent, but there is absolutely no evidence, contrary to the representation made in Petitioners' Brief, that Petitioners accepted the so-called repudiation and elected to rescind the agreement for that reason. A review of the record will reveal that neither of the Petitioners testified that they objected to execution of the releases. Neither did they state that the releases contained any recitation which was objectionable to them. Neither did they ever make a complaint to Respondent about tender of the releases or

the form thereof (R.1267-1269). There is not one shred of testimony from either of the Petitioners that their telegram of April 18, 1970 (R.Vol.4, p 80), wherein they rejected the compromise and settlement agreement, was sent as a direct response to the submission of the releases for execution. In fact, the only direct evidence in this record explaining why Petitioners' repudiation telegram of April 18, 1970 was sent is that Petitioner Murtagh had become disturbed about a prospectus that had been sent to her, or about the way the company was being managed (R. 1267). In other words, there is no evidence that Petitioners regarded the submission of the release as a repudiation of the contract, and there is no evidence that in response to that alleged repudiation they elected to rescind the contract. This complete lack of evidence of connection between the tender of the release and Petitioners' repudiation of the compromise and settlement agreement was specially noted by the Court of Appeals in its Opinion (Appendix A to Petition for Certiorari, p 44).

4. *Settlement of Federal Securities Fraud Actions*

Plaintiffs cite §14 of the Securities Act of 1933 (the "1933 Act") and §29(a) of the Securities Exchange Act of 1934 (the "1934 Act") for the proposition that the oral agreement of compromise and settlement made by the parties hereto is against public policy and cannot be enforced. The provisions to which Petitioners refer contemplate only conditions, stipulations or provisions to waive prospective violations of the 1933 and 1934 Acts. The provisions certainly were not intended by Congress to pro-

hibit the settlement of existing controversies which arose out of completed and past violations of the 1933 or 1934 Acts.

This Honorable Court in its decision of *Wilko v. Swan*, 346 U.S. 427 (1953), recognized the distinction between pre-controversy and post-controversy stipulations when it considered application of §14 of the 1933 Act. In *Wilko* the plaintiff brought action against the partners in a securities brokerage firm under §12(2) of the 1933 Act, this section being essentially a counterpart of §10(b) of the 1934 Act. The defendants moved to stay the trial until plaintiffs submitted to arbitration as required by the margin agreement entered into between the parties before occurrence of the transaction which was the subject of the suit. This Court held that the agreement to arbitrate future disputes was void with regard to plaintiffs' cause of action under the 1933 Act, since it had the effect of prospectively waiving the provisions of that Act providing for a judicial forum. Mr. Justice Reed's majority opinion stressed the element of prospective waiver:

> When the security buyer, *prior to any violation of the Securities Act*, waives his right to sue in court, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary. (p. 187) (Emphasis added)

> By the terms of the agreement to arbitrate, petitioner is restricted in his choice of forum *prior to the existence of a controversy. While the Securities Act does not require petitioner to sue, a waiver in advance of a controversy stands upon a different footing.* (p. 188) (Emphasis added)

Unquestionably the Court recognized a distinction between pre-controversy and post-controversy waivers. The intimation is that when both sides are equally apprised of the facts, there is no need for a rule protecting the investor. See also, *Junker F. Midterra Associates, Inc.*, 49 F.R.D. 310 (S.D.N.Y. 1970).

Mr. Justice Jackson in his concurring opinion in *Wilko* said what was left unsaid in the majority opinion when he suggested that an arbitration agreement entered into *after* a controversy has arisen would not be void under §14 of the 1933 Act. This suggestion became an express holding in *Moran v. Paine, Weber, Jackson & Curtis*, 389 F.2d 242 (3rd Cir. 1968), involving a suit under Rule 10(b)-5 subsequent to an arbitration award which the plaintiff considered unsatisfactory. The Third Circuit refused to find that §29a of the 1934 Act voided an arbitration agreement entered into between the parties *after* the Rule 10(b)-5 violation was discovered. Rather the court ruled that the arbitration and award was a complete defense to the plaintiff's action since the plaintiff voluntarily agreed to that method of resolution of the controversy. The analogy of the *Moran* situation to that now before the Court is obvious. If §29a is inapplicable to an agreement to submit

an existing controversy to arbitration, then it is inapplicable to an agreement to resolve an existing controversy between the parties themselves.

The distinction between pre-controversy and post-controversy settlement was acknowledged in *Cohen v. Tenney Corp.*, 318 F.Supp. 280, 284, *on motion for reargument* (S.D.N.Y. 1970), a decision cited by Petitioners at page 22 of their Petition for Certiorari. The Petitioners failed to tell this Court that upon reargument the court in *Cohen* completely reversed its prior holding that releases could not be an affirmative defense, and stated instead that:

> Since the 1933 Securities Act does not require persons aggrieved by violations of its provisions to sue, this general release, purporting to settle an already ripened controversy is not by its terms void as a matter of law. (p. 284) (citing *Wilko v. Swan, supra).*

The other decision cited by Petitioners, *Pearlstein v. Scudder,* 429 F.2d 1136 (2d Cir. 1970), also fails to support the proposition that a Securities Act claim cannot be settled. In that case the parties entered into a settlement agreement wherein one party, a stock broker, agreed to permit payment over an extended time of the purchase price of securities previously purchased by the other party, who had been unable to pay the total of such purchase price on the statutory settlement date. The court there held that the extension by the stock broker of additional time within which to pay the stock purchase price was an extension of credit prohibited by the securities laws. The

settlement agreement was an agreement to violate the securities laws in the future, and was clearly an attempt to waive future compliance with the securities laws. The decision was, as stated in *Liuni v. Cover,* Civ. No. 38375 (S.D.N.Y., March 24, 1972), "simply a holding that settlements which, by their very terms provide for further violations of the securities laws, are void under §29(a)."

The court in *Liuni* expressly held that releases and settlements of ripened violations of the Securities Acts are not void. The court had this to say:

> It was the contention of the Plaintiffs on argument, and alleged in the amended complaint, that the releases are null and void because they were made in violation of §29(a) of the 1934 Act and against public policy. Both of these contentions are premised upon erroneous conclusions of law.
>
> Public policy has been to encourage settlements and compromises freely and voluntarily reached by the parties to a controversy. Following the threat of the filing of a complaint, there definitely was a controversy as to the existence of liability of [defendants] on their loan agreement and the money evaluation of that liability if it were found to exist. I find no authority — Congressional enactment or judicial decision — which forbids the approval of settlement of Regulation U controversies.

A statute similar to §14 and §29a of the 1933 and 1934 Acts is §5 of the Federal Employers' Liability Act (45 U.S.C.A. §55):

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void:. . .

In *Callen v. Pennsylvania R. Co.*, 332 U.S. 625 (1948), this Court held that this statute did not make void a post-controversy release. The Court said:

> It is obvious that a release is not a device to exempt from liability but is a means of compromising a claimed liability and to that extent recognizing its possibility. Where controversy exist as to whether there is liability, and if so for how much, Congress has not said that parties may not settle their claims without litigation. (Page 298-99)

It appears inescapable that the analogy of *Callen* disposes of Petitioners' position as to the effect of §14 and §29a of the 1933 and 1934 Acts. In fact, *Callen* was cited in *Wilko* for the proposition that ". . . the Securities Act does not require petitioner to sue . . ." (p. 188)

Petitioners further argue that there are no jury findings to the effect that Petitioners "were informed of the particular statutory rights afforded them by the Securities Acts" and, therefore, any waiver by them of their rights was ineffective under §14a and §29a. In support of this proposition Petitioners cite two cases which involve waivers, as

opposed to settlement agreements. In each of those cases the act said to have constituted the waiver was committed without knowledge on the part of the plaintiff of the *facts* constituting a violation of the Securities Acts. In *Royal Air Properties, Inc. v. Smith,* 333 F.2d 568 (9th Cir. 1964), the plaintiff bought stock from an officer of Royal Air Properties, Inc. who failed to disclose to plaintiff the fact that the prior chief executive officer of the company had resigned as a director and had demanded repayment of a substantial loan he had made to the company. Plaintiff did not learn of this demand for repayment until *after* he had done the acts which defendants claimed constituted a waiver. In *Childs v. Ric Group, Inc.,* CCH Fed. Sec. Law Rep., §93,333 (D.C. Georgia 1970), defendants purchased the stock of plaintiffs without advising plaintiffs that merger negotiations were in progress affecting the company. Plaintiffs did not actually learn of the negotiations until *after* they had sold their stock to defendants, which was long after the purported waiver. The language in *Childs* and *Royal Air,* which has been lifted by Petitioners for the proposition that one must be informed as to the statutory provisions of the Securities Acts before one can settle claims arising out of those Acts, is related solely to ignorance of the facts and not to ignorance of the law. A close reading of these cases will reveal that the courts said nothing about what knowledge of the statutory provisions is required before a waiver or settlement will be recognized. It is unfortunate that *Childs* used the particular language quoted by Petitioners for its does appear to be directed to knowledge of the statutory provisions, as opposed to the

facts comprising a violation. However, a reading of this language in the context of the rest of the *Child's* opinion shows that the court had no intention whatsoever of stating that knowledge of the statutory provisions is required. Petitioners simply lifted this language out of context and now seek to establish an unprecedented rule with respect to compromise and settlement agreements.

It cannot be disputed in this case that Petitioners were fully informed as to the facts which comprised the alleged violation of the Securities Acts. Further, there is sufficient evidence in the record to indicate that not only did they know all of the facts, but they knew that such facts comprised violations of the Securities Acts. Petitioners' own letters to Respondent claimed that misrepresentations had been made to them with respect to the stock they would receive (R.Vol.4, p 68-71). One of these letters, Plaintiffs' Exhibit 30, was a demand letter prepared by Petitioners' attorneys, a Wall Street firm in New York City. Petitioner Powell testified that in February, 1970, he began talking to his Bahamian attorneys with respect to American securities law (R. 636). He further testified that those attorneys put him in touch with attorneys in New York City who were acquainted with "American stock laws" (R. 635). The Wall Street law firm acquainted with the American securities law advised Petitioners to sue Respondent (R. 638) and drafted Plaintiffs' Exhibit 30 which accused Respondent of "material misrepresentations." Petitioner Powell testified that this same law firm advised him that his shares were restricted under the

Securities Acts (R. 675-676). Shortly after the settlement agreement had been made between Respondent and Petitioners, Petitioners again consulted with these New York lawyers (R. 649) and suit was initiated soon thereafter claiming Securities Act fraud. It is inconceivable under this evidence that Petitioners had no knowledge of their rights under the Securities Acts. It is submitted that without violating attorney-client privilege the evidence could not have been more explicit in this regard. Petitioners had consulted with experts in the area of American securities law and had thereafter claimed "material misrepresentations." Contrary to Petitioners' statement in their Petition for Certiorari, there was substantial evidence of knowledge by Petitioners of their rights under these Securities Acts.

This is another of Petitioners' arguments that appeared for the first time after the case had been submitted to the jury. Undoubtedly Petitioners' knowledge of the securities laws at the time of making the compromise and settlement agreement was a fact issue. Petitioners at no time requested submission to the jury of this issue of fact. Accordingly, Petitioners waived a jury trial with respect to this issue of fact, and the take nothing judgment constituted a deemed finding against Petitioners on such issue (Rule 49(a), Fed. Rules of Civ. Proc.). Moreover, Petitioners at no time objected to the failure to include a special issue or instruction in these respects in the Charge, and may not now assign as error that to which they failed to make objection as required by Rule 51, Federal Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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CERTIFICATE

This is to certify that a copy of Brief For Respondents In Opposition was this, the 26th day of June, 1974, served upon Johnson, Bromberg, Leeds & Riggs by mailing the same to them at the Fifteenth Floor, Two Eleven North Ervay, Dallas, Texas, 75201.

HAROLD HOFFMAN